



HANDLING DISABILITY ISSUES

Part 2

A Webinar Panel Presentation by

EPIC – Employment Practices Improvement Committee

The presentation will start at **10:00**

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HANDLING DISABILITY ISSUES

Part 2

Leaves, Return to Work, Separation

A Panel Presentation sponsored by *EPIC* – UC's
Employment Practices Improvement Committee

April 15, 2010



Panelists

- GayLynn Kirn Conant – *Lombardi, Loper & Conant*
- Dennis Huie – *Rogers, Joseph, O'Donnell*
- Adrienne Malka- *Manager, Employee Disability Management Services, UCLA*
- Leslie Van Houten – *Senior Counsel, Office of the General Counsel, UCOP*

Moderator: Carolyn Yee – *Senior Counsel, Office of the General Counsel, UCOP*



What is a Protected Disability?

- A physical or mental disability or medical condition that limits (makes achievement of a major life activity difficult) one or more major life activities (physical, mental, social activities and working)
- An employee with a record or history of a mental or psychological disorder or condition which is known to the employer, or who is regarded or perceived or treated by the employer as having a mental disorder or medical condition



What is a Protected Disability?

- **Medical Condition:** Cancer or Genetic Characteristics
- **Physical Disability:** Physiological condition that affects the neurological, immunological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin or endocrine systems
- **Mental Disability:** Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities



What is a Protected Disability?

Broad coverage: Nearly every condition that impacts the ability to work or perform a major life function is covered. California statutory disabilities include:

- HIV/AIDS
- Hepatitis
- Epilepsy
- Seizure Disorder
- Clinical Depression
- Bipolar Disorder
- Diabetes
- Multiple Sclerosis
- Heart Disease



What is NOT a Protected Disability?

Exclusions:

- Sexual behavior disorders
- Compulsive gambling
- Kleptomania
- Pyromania
- Psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs



What is a Perceived Disability?

Regarded/Perceived/Treated as Disabled:

- Employee does not need to be limited in a major life activity
- Focus is whether employer treats the individual as having an impairment that limits major life activities even though the employee may not actually have a disability



What are the Types of Leaves?

- Sick Leave, Extended Sick Leave
- Family Medical Leave (CFRA, FMLA)
- Pregnancy Disability Leave
- Worker's Compensation Leave
- Reduced Schedule/Part-Time Leave
- Intermittent Leave
- Extended Leave

Leave of Absence – PPSM 43

http://atyourservice.ucop.edu/employees/policies_employee_labor_relations/personnel_policies/spp43.html



Sick Leave and Extended Sick Leave

- **Sick Leave** can be used as wage replacement or to supplement a disability benefit when medically unable to work. It is a limited accrual of time for pay purposes. Sick Leave – PPSM 42
http://atyourservice.ucop.edu/employees/policies_employee_labor_relations/personnel_policies/spp42.html
- **Extended Sick Leave** is a supplement to workers' compensation temporary disability for up to 26 weeks. The amount paid equals the difference between temporary disability benefit and 80% of the employee's salary. It is available after exhausting sick leave accrual.

Work Incurred Injury or Illness – PPSM 44

http://atyourservice.ucop.edu/employees/policies_employee_labor_relations/personnel_policies/spp44.html



Family and Medical Leave

University Policy is based on California Family Rights Act(CFRA)/ federal Family Medical Leave Act (FMLA) provide 12 weeks unpaid leave:

- To care for employee's own "serious health condition";
- To care for spouse, domestic partner, child or parent who has "serious health condition";
- For birth or care of employee's newborn child;
- For placement of child with employee for adoption or foster care.



Pregnancy Disability Leave

- Eligibility: employed (even 1 day) and pregnant;
- For disabilities caused by pregnancy and pregnancy-related conditions;
- For up to 4 months of the pregnancy/pregnancy related disabilities;
- Special return to work provisions



Workers' Comp Leave

- Department's (not Sedgwick's) responsibility to notify employee about FMLA and supplemental leaves per policy or contract
- Leaves run concurrently with WC process
- Once leave "entitlements" exhaust, notify employee about leave as accommodation



Certifying Leaves

Medical Documentation/Certification can be required for all leaves

- Family & Medical Leave (FML): After notice for leave, employer must respond in five days regarding eligibility. Upon receipt of sufficient medical info, must designate leave as FML. Certification cannot require disclosure of the medical condition;
- Length of absence (PPSM 43);
- Workers' comp leaves- certification should be submitted to department, not just Sedgwick



Managing Intermittent Leave

- Be attuned to patterns of absences;
- Provide the FML paperwork as soon as you are aware of repeated, episodic absences;
- Be on top of certification and re-certifications;
- For every absence ask if it was for the FML purpose and document the reason for the time off;
- Record each hour used;
- Consider transfer to another position which better suits the need for recurring leave if the leave is for planned foreseeable medical treatment;
- If not FML, consider whether unpredictable episodic absences from work are reasonable.



Return to Work

- Reinstatement
- Reassignment to Alternate Position
- Temporary Reassignment
- Part-Time Reassignments
- Transitional Return to Work
- Transfer, Geographic Transfers
- Special Selection (PPSM 81)



Return to Work: Fitness for Duty

Fitness for Duty v. Functional Capacity

- Fitness for duty is medical exam, which is used sparingly. Permitted only if employer has reasonable belief that medical condition will impair employee's ability to perform essential job functions or is a direct threat to employee or others (beware perceived disability problem)
- Functional capacity evaluation is not medical exam. Requires simulation of certain skills and capacities needed to perform job



Medical Separation

- Leave entitlements are exhausted;
- Employee's restrictions are understood;
- Employee's restrictions prevent him/her from performing one or more essential job functions of the position;
- Employer and employee have evaluated but are unable to find a reasonable accommodation;
- Reassignment is not available because neither the employer nor the employee can identify an open, vacant position (for which the employee is minimally qualified)



Medical Separation Process

Requires:

- Written statement by Department Head;
- Documentation, including job description and medical information;
- Analysis by Voc Rehab/Disability Management;
- Prescribed notices
- Post- med sep, a former employee may be selected for a position without the requirement that the position be publicized (special reappointment)



Managing Attendance and Job Performance Issues

- Excessive absenteeism, unscheduled absences
- Timing of discipline to improve performance
- Lack of medical certification/documentation
- Extending leave to unpaid leave



Hypothetical

- Sarah Heartburn is a long-term, exempt Student Affairs Officer for the Biology Department. Among other things, her essential functions include tutoring, ordering class supplies (materials and books) for faculty, entering course offerings and course descriptions for the catalog and doing degree checks for the students. She has been feisty and has pushed back against her supervisors in the past, but she has been considered to be a good worker.
- A new manager, Nue Kidd, began 6 months ago. After numerous one-on-one counseling meetings, Kidd gave Heartburn a counseling memo for poor performance which addressed a lack of focus, letting important tasks drop, and missing deadlines.
- Heartburn has been incurring more frequent absences. Sometimes she says she's not feeling well or that she is just feeling "out of sorts". Occasionally she turns in a doctor's certification for the time missed. Her absences have steadily increased in number and, for about the past 3 months, she has been absent about 1 to 2 days every week.



Cont. of Hypothetical

- Meanwhile, several co-workers have come to you complaining privately. You supervise Heartburn's supervisor, Kidd, and you have a good relationship with the staff. Co-workers revealed that Heartburn is talking and muttering to herself and seems to not be grooming herself. Some trivial things set her off and she explodes, then she apologizes. Heartburn's co-workers are uneasy with the whole situation and are worried.
- After months of this, you finally have Kidd talk to Heartburn and tell her she might be eligible for Family and Medical Leave (FML). You also have HR provide Heartburn with the notice of eligibility letting her know that she is eligible for FML and telling her what else she needs to do to obtain FML. Heartburn returns the FML documents. Beginning on September 1, she takes intermittent FML for her increasing absences. She's on intermittent FML for 2 months. The next day, Heartburn turns in a revised FML certificate which places Heartburn on full time leave for an indeterminate time. She runs through her sick-leave and vacation time. After 8 weeks of leave, Sarah is released to return to work with no restrictions. The same absence cycle begins again and Heartburn's doctor puts her out on full FML. She's out for another 20 weeks and is again released to return to work (RTW). Meanwhile, Kidd informs you that he is planning to give her a written warning when she returns for poor work performance.



Cont. of Hypothetical

- There were rumors that she was in a psych ward while she was out and co-workers are very uneasy about her coming back. Her co-workers want to know whether she will be allowed to return to work.
- Prior to her return to work, Heartburn presents two return-to-work certifications. The first certification is from Ima Quack, M. D., and says “no stress, limited contact with supervisor, must take days off as needed.” The second, from an orthopedist, L.Z Bones, M.D. states “no prolonged sitting or keyboarding for more than 45 minutes per hour.” Dr. Bones adds “with these limitations appropriately accommodated, Ms. Heartburn will be able to return to full time work.” It is unknown whether the restrictions from either Dr. Quack or Dr. Bones are permanent or temporary.